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LEMBAGA KEMAJUAN WILAYAH KEDAH (KEDA) v. NUR DINI MOHD NOH

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
DAVID WONG DAK WAH JCA
B UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEAL NO: K-02-1212-05-2013]
29 JANUARY 2018

C ***LABOUR LAW:*** *Employment – Dismissal – Probationer – Employee terminated with one month's salary due to failure to obtain recommendation from Head of Department for confirmation of services – Whether employee's appointment subject to conditions of service in letter of offer – Whether employee breached conditions of employment – Whether employer complied with principle of procedural fairness – Whether termination of employee's services a breach of art. 5 of Federal Constitution* D *– Whether employer had right to terminate employee as probationer without assigning reason – Whether termination of employee's employment valid and consistent with terms of letter of offer*

The appellant/defendant ('KEDA') appointed the plaintiff/respondent ('plaintiff') as a Grade W41 Auditor and as part of the conditions of the offer, E the plaintiff was placed on probation for one to three years. The plaintiff's probation was extended three times until KEDA terminated her with one month's salary (*in lieu* of one month's notice) based on the following reasons (i) failure to fulfil the requirement; and (ii) she had served for a period of five years without being confirmed. The plaintiff filed a civil suit in the High F Court. In allowing the plaintiff's claim, the Judicial Commissioner ('JC') declared that, *inter alia*, KEDA's termination of the plaintiff's services, due to the failure to obtain the recommendation from the Head of Department for the confirmation of her services, was null and void. The JC had also found that KEDA had failed to inform the plaintiff the reasons the G recommendation was not given to the plaintiff and that this failure amounted to a failure to follow the principle of procedural fairness. The JC was further of the view that the termination of the plaintiff's services was a breach of art. 5 of the Federal Constitution. Thus, KEDA appealed.

Held (allowing appeal with costs)

H **Per Umi Kalthum Abdul Majid JCA delivering the judgment of the court:**

(1) A plain reading of conditions 4(a), (b) and (e) of the letter of offer given to the plaintiff conveys the meaning that the plaintiff's appointment was subject to the conditions of service. Therefore, by virtue of condition 4(b), the plaintiff was required to obtain the recommendation of her I Head of Department in order to be confirmed in her post, which she

failed to obtain despite three extensions of probation period being given to her. She had therefore breached her condition of employment and her employment was correctly terminated by KEDA. (para 25)

(2) With regard to the issue of KEDA not complying with the principle of procedural fairness *vis* the plaintiff in not informing her the reasons the recommendation was not given by the Head of Department, the principle in the case of *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal* did not apply, seeing that the plaintiff was a probationer at all material times and she was subject to the conditions in the letter of offer. The case of *Abdul Rauf Alip v. Suruhanjaya Pasukan Polis & Anor* applied to this case. (para 26)

(3) The plaintiff ought to have been more proactive in inquiring about obtaining the Head of Department's recommendation throughout her probation and extended probation period, yet the plaintiff chose to remain silent and unconcerned until she chose to raise this complaint when she filed this suit. KEDA was not to be solely held liable for not informing the plaintiff the reasons for her not being recommended to be confirmed. There was hardly any explanation given by the plaintiff on how, after five years of being on probation, her performance had not improved. Further, the application of art. 5 of the Federal Constitution in this context was misconceived as the termination of the plaintiff's services was purely on the basis of breach of contractual terms by the plaintiff and did not involve the deprivation of her life nor personal liberty within the meaning of the said art. 5. (paras 28 & 29)

(4) By virtue of condition 4(f) of the letter of offer, whereby it was stated that the plaintiff's employment could be terminated by KEDA at any time by one month's notice or a month's salary *in lieu* of the said notice without the need to give any reasons, KEDA had every right to terminate the plaintiff's contract of employment as a probationer without assigning any reason for the termination by paying one month's salary *in lieu* of notice. Thus, the termination of the plaintiff's employment was consistent with the terms of the letter of offer and was valid. (paras 30 & 31)

***Bahasa Malaysia** Headnotes*

Perayu/defendan ('KEDA') melantik plaintif/responden ('plaintif') sebagai Juruaudit Gred W41 dan sebagai sebahagian tawaran, plaintif diletakkan dalam tempoh percubaan pekerjaan selama satu tahun hingga tiga tahun. Tempoh percubaan pekerjaan plaintif dilanjutkan sebanyak tiga kali sehingga KEDA menamatkan pekerjaannya dengan gaji satu bulan (sebagai ganti notis satu bulan) berdasarkan alasan-alasan berikut (i) kegagalan untuk memenuhi keperluan; dan (ii) plaintif telah berkhidmat untuk tempoh lima tahun tanpa

disahkan. Plaintif memfailkan guaman sivil di Mahkamah Tinggi. Dalam membenarkan tuntutan plaintif, Pesuruhjaya Kehakiman ('PK') mengisytiharkan bahawa, antara lain, penamatan perkhidmatan plaintif oleh KEDA, kerana kegagalan untuk mendapatkan saranan daripada Ketua Jabatan, adalah terbatal dan tidak sah. Pesuruhjaya Kehakiman juga mendapati bahawa KEDA telah gagal memaklumkan plaintif alasan-alasan mengapa saranan tidak diberikan kepada plaintif untuk mengesahkan perkhidmatannya dan bahawa kegagalan ini berjumlah kegagalan mengikuti prinsip keadilan prosedur. Pesuruhjaya Kehakiman selanjutnya berpendapat bahawa penamatan perkhidmatan plaintif melanggar per. 5 Perlembagaan Persekutuan. Oleh itu, KEDA merayu.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Umi Kalthum Abdul Majid HMR menyampaikan penghakiman mahkamah:

(1) Bacaan syarat-syarat 4(a), (b) dan (e) surat tawaran yang diberikan kepada plaintif menyampaikan maksud bahawa pelantikan plaintif tertakluk pada syarat-syarat perkhidmatan. Oleh itu, menurut kuasa syarat 4(b), plaintif perlu untuk memperoleh saranan Ketua Jabatan untuk disahkan jawatannya, tetapi dia gagal berbuat sedemikian walaupun tempoh percubaannya telah dilanjutkan masa sebanyak tiga kali. Dengan itu, plaintif telah melanggar syarat perkhidmatannya dan pekerjaannya telah ditamatkan dengan betul.

(2) Berkenaan isu KEDA tidak mematuhi prinsip keadilan prosedur apabila plaintif tidak dimaklumkan alasan-alasan mengapa saranan tidak diberikan oleh Ketua Jabatan, prinsip dalam kes *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal* tidak dipakai, memandangkan plaintif adalah dalam tempoh percubaan dan tertakluk pada syarat-syarat dalam surat tawaran. Kes *Abdul Rauf Alip v. Suruhanjaya Pasukan Polis & Anor* dipakai dalam kes ini.

(3) Plaintif seharusnya lebih proaktif dalam bertanya tentang mendapatkan saranan Ketua Jabatan semasa dalam tempoh percubaan serta lanjutan tempoh percubaan pekerjaannya, tetapi plaintif memilih untuk senyap dan tidak peduli sehingga dia membangkitkan aduan ini apabila memfailkan guaman ini. Bukan KEDA sahaja pihak yang bertanggungjawab kerana tidak memaklumkan plaintif alasan-alasan mengapa dia tidak disarankan untuk disahkan. Tiada penjelasan yang diberikan plaintif berkenaan bagaimana, selepas lima tahun dalam tempoh percubaan, prestasinya tidak bertambah baik. Tambahan, per. 5 Perlembagaan Persekutuan dalam konteks ini disalah anggap kerana penamatan perkhidmatan plaintif adalah semata-mata berdasarkan pelanggaran syarat kontrak oleh plaintif dan tidak melibatkan pengambilan nyawanya atau kebebasan peribadi dalam maksud per. 5 tersebut.

(4) Menurut syarat 4(f) surat tawaran, di mana dinyatakan bahawa pekerjaan plaintif boleh ditamatkan oleh KEDA pada bila-bila masa melalui notis satu bulan atau gaji satu bulan menggantikan notis tersebut tanpa memberikan apa-apa alasan, KEDA mempunyai hak untuk menamatkan kontrak pekerjaan plaintif sebagai pekerja dalam percubaan tanpa menetapkan apa-apa alasan untuk penamatan itu dengan membayar satu bulan gaji menggantikan notis. Oleh itu, penamatan pekerjaan plaintif adalah selaras dengan syarat-syarat surat tawaran dan adalah sah.

Case(s) referred to:
Abd Rauf Alip v. Suruhanjaya Pasukan Polis & Anor [2003] 1 CLJ 1 CA ***(foll)***
Government of Malaysia v. Lionel [1973] 1 LNS 37 PC ***(refd)***
Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal [1997] 1 CLJ 665 CA ***(dist)***

Legislation referred to:
Federal Constitution, art. 5
Rules of Court 2012, O. 18 r. 12(1A)

For the appellant - Arham Rahimy Hariri; M/s Azim, Tunku Farik & Wong
For the respondent - Zakaria Md Saad; M/s Zakaria & Co

[Editor's note: For the High Court judgment, please see Nur Dini Md Noh lwn. Lembaga Kemajuan Wilayah Kedah (KEDA) [2014] 1 CLJ 371 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Umi Kalthum Abdul Majid JCA:

Introduction

[1] This was an appeal by the Lembaga Kemajuan Wilayah Kedah (KEDA)/the appellant/the defendant against the decision of the then learned Judicial Commissioner (JC) allowing the claim of the plaintiff/respondent essentially for a declaration that the termination of the plaintiff's service by KEDA was invalid, that she be given a permanent employee status by KEDA effective from 9 September 2008 and general and exemplary damages.

[2] In these grounds, we will refer the respondent as the plaintiff and the appellant as "KEDA".

Brief Facts

[3] *Vide* letter of offer of employment dated 9 October 2006 (letter of offer) (P2), KEDA appointed the plaintiff as a Grade W41 Auditor effective from 16 November 2006. As part of the conditions of the offer, the plaintiff was placed on probation for one to three years.

[4] The plaintiff's probation was extended for the first time from 16 November 2009 to 15 November 2010 (first extension) as she had failed to obtain the recommendation from her Head of Department (the requirement).

[5] Two more extensions were given to the plaintiff – from 3 December 2010 to 2 December 2011 (second extension); and from 3 December 2011 to 2 June 2012 (third extension) – due to the same failure to fulfil the requirement.

[6] On 10 July 2012, KEDA terminated the plaintiff's employment with one month's salary (*in lieu* of one month's notice) based on the following reasons:

(a) failure to fulfil the requirement; and

(b) she had served for a period of five years without being confirmed.

[7] On 28 February 2011, before the expiry of the third extension, the plaintiff filed this civil suit in the Alor Setar High Court.

[8] It was KEDA's case that:

(a) confirmation of the plaintiff's service was subject to the terms and conditions of the letter of offer, which included the need to obtain the recommendation (perakuan) from the Head of Department;

(b) KEDA had the right to terminate the plaintiff's employment seeing that the plaintiff was an officer who had not been confirmed in service; and

(c) there was no duty on the part of KEDA to provide any explanation as to why the Head of Department did not give the requisite recommendation.

[9] In allowing the plaintiff's claim, the learned JC made the following orders:

(a) declaration that KEDA's termination of the plaintiff's service as Grade W41 Auditor, due to the failure to obtain the recommendation from the Head of Department, was null and void;

(b) confirmation of the plaintiff as Grade W41 Auditor effective from 9 September 2008;

(c) cancellation of the Head of Department's instructions on the stopping of the movement of the plaintiff's annual salary;

(d) adjustment of the plaintiff's salary from the period the plaintiff's salary movement was stopped until the termination;

(e) general and exemplary damages of RM200,000; and

(f) costs of RM8,000.

[10] KEDA now appealed against that order/decision.

Before The High Court

[11] The learned JC had addressed three issues before her as follows:

(a) whether the Head of Department was required to give his recommendation for the purpose of confirmation in the post;

(b) whether the Head of Department was required to state the reasons/grounds to the plaintiff as to why she was not given the recommendation for her confirmation before the appointing authority;

(c) whether KEDA was entitled to terminate the plaintiff's service upon her failure to obtain the recommendation from the Head of Department for the purpose of her confirmation in her post.

[12] On the first issue, the learned JC acknowledged the fact that the letter of offer (P2), para. 4 had stipulated the conditions for admission of the plaintiff into service, amongst others, to undergo a period of one to three years of probation and subject to confirmation in service, other fulfilling condition in para. 4(a) and be recommended by the Head of Department.

[13] On the second and third issues, the learned JC found that KEDA had failed to inform the plaintiff the reasons the recommendation was not given to the plaintiff for the confirmation of her service. This failure therefore amounted to a failure to follow the principle of "procedural fairness" as laid down in this court's decision in *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665. The learned JC was further of the view that the termination of the plaintiff's service was a breach of art. 5 of the Federal Constitution (the Constitution) as the plaintiff was only reprimanded by KEDA/SD2 during a public assembly, instead of calling the plaintiff in private to be reprimanded or for guidance.

[14] As for the exemplary and aggravated damages of RM200,000 awarded to the plaintiff by the learned JC, the learned JC was of the view that KEDA could not raise this issue as being contrary to O. 18 r. 12(1A) of the Rules of Court 2012 (ROC) since KEDA did not plead this issue in its statement of defence.

[15] As we have stated earlier, the learned JC, therefore, allowed the plaintiff's claim.

Decision Of The Court

[16] Before proceeding to consider this appeal, it behoved us to lay out the conditions of service imposed on the plaintiff in the letter of offer (P2). They are as follows:

Syarat-syarat Perkhidmatan

4. Perlantikan tuan/puan adalah dikenakan syarat-syarat perkhidmatan seperti berikut:

(a) Berkhidmat dalam tempoh percubaan selama **satu hingga tiga tahun.** Dalam tempoh percubaan ini, tuan/puan adalah dikehendaki:

Hadir dengan jayanya Kursus Induksi dan Lulus Peperiksaan Perkhidmatan yang ditetapkan sebelum disahkan dalam perkhidmatan.

(b) **Tertakluk kepada pengesahan dalam perkhidmatan setelah memenuhi syarat 4(a) serta diperakukan oleh Ketua Jabatan/ Perkhidmatan;**

(c) Sebelum disahkan dalam perkhidmatan, tuan/puan diberi opsyen sama ada memilih Skim Pencen atau Skim Kumpulan Wang Simpanan Pekerja (KWSP) oleh Ketua Jabatan/ Perkhidmatan;

(d) Tuan/puan layak mendapat cuti mengikut peraturan-peraturan yang berkuatkuasa dari semasa ke semasa;

(e) **Perkhidmatan tuan/puan boleh ditamatkan sekiranya gagal disahkan dalam tempoh percubaan mengikut peraturan-peraturan yang berkuatkuasa dari semasa ke semasa;**

(f) **Tuan/puan boleh diberhentikan daripada jawatan bila-bila masa selepas diberi sebulan notis atau sebagai ganti notis dibayar sebulan gaji bersih, dengan tidak diberi sebarang sebab.** Tuan/puan juga berhak meletak jawatan dengan memberi sebulan notis ataupun sebagai ganti notis membayar balik sebulan gaji bersih. Setelah tuan/puan disahkan dalam jawatan, notis yang dikehendaki bagi kedua-dua pihak ialah 3 bulan atau sebagai ganti notis membayar sebulan gaji bersih;

(g) Tuan/puan dikehendaki menjalani kursus latihan yang ditetapkan oleh Ketua Jabatan/Perkhidmatan;

(h) Pergerakan gaji adalah tidak automatic dan akan ditetapkan oleh Ketua Jabatan/Perkhidmatan berdasarkan prestasi kecemerlangan perkhidmatan;

(i) Tuan/puan boleh diarah berkhidmat di mana-mana tempat oleh Kerajaan.

(j) Sebagai seorang kakitangan Lembaga ini, tuan/puan tertakluk kepada Perintah-Perintah Am Lembaga Kemajuan Wilayah Kedah (KEDA), Skim Perkhidmatan, Pekeliling/Surat Pekeliling, Peraturan-Peraturan Pentadbiran yang berkuatkuasa dari semasa ke semasa mengenai kerja, kelakuan dan syarat perkhidmatan pegawai-pegawai dalam perkhidmatan Lembaga Kemajuan Wilayah Kedah (KEDA);

(k) Tuan/puan juga diwajibkan mengisytiharkan semua pemilikan harta tuan/puan, isteri dan anak kepada Lembaga Kemajuan Wilayah Kedah (KEDA) tidak lewat dari tiga (3) bulan selepas tarikh melapor diri;

(l) Tuan/puan adalah tertakluk kepada syarat-syarat lain yang ditambah atau dipinda dari semasa ke semasa. (emphasis added)

[17] Of relevance to this appeal are conditions 4(a), (b), (e) and (f), that are:

(a) the plaintiff was required to serve on probation for one to three years during which time she was to attend successfully the Induction Course and pass the Service Examination which had been determined before she could be confirmed in service;

(b) be subject to her confirmation in service after she had fulfilled condition 4(a) as well as be recommended by her Head of Department/Service;

(c) if the plaintiff failed to be confirmed during the probation period, her service could be terminated;

(d) the plaintiff's service could be terminated at any time after a month's notice had been given or be given a month's salary *in lieu* of notice and without any reason be given.

[18] In accepting the conditions laid down in the letter of offer, the plaintiff had clearly accepted the conditions imposed, in particular, that she was required to obtain the recommendation of her Head of Department before she could be confirmed in her post as an auditor. In respect of her three-year probation period, the plaintiff's Head of Department (SD2) had this to say in regard to his recommendation of the plaintiff (P18A):

Bahagian B: SOKONGAN PERAKUAN OLEH PENGURUS BESAR

1.1 Pegawai di atas ~~TELAH~~/TIDAK menjalankan tugas-tugasnya dengan jujur dan bertanggungjawab dan saya ~~BERPUASHATI~~/TIDAK BERPUASHATI dengan perkhidmatannya dan juga sifat peribadi, perangai dan kelakuan; dan

1.2 Dengan ini saya ~~MENYOKONG~~/TIDAK MENYOKONG untuk mengesahkan pegawai di atas dalam jawatannya mulai tarikh yang dicadangkan.

A Tarikh: 26.4.2009 ... t.t ...

(Tandatangan & Cop Rasmi)

*Semasa menjalankan tugas di bawah pengawasan saya, pegawai ini telah gagal melaksanakan tugas dan tanggungjawab sebagai Ketua Audit Dalam, dan beliau juga didapati kurang berbincang dan membuat laporan B mengenai apa-apa tindakan yang beliau lakukan.

On 26 October 2009, again the Head of Department repeated the first part of his non-recommendation as stated before this (P18B), and added the following remarks:

C Saya tidak berpuashati dengan prestasi dan tingkahlaku pegawai ini. Berdasarkan prestasi tahun 2008 serta perkara-perkara yang pegawai ini lakukan seperti laporan-laporan yang dikeluarkan dan kemukakan tanpa terlebih dahulu merujuk kepada ketua jabatan, laporan yang tidak berdasarkan fakta yang lengkap dan teliti, telah menjejaskan imej dan keharmonian organisasi.

D **[19]** Due to the non-recommendation by her Head of Department, the plaintiff was given the first extension of her probation period from 16 November 2009 to 15 November 2010. Again, on 17 October 2010, her Head of Department gave the same non-recommendation report against the plaintiff as before (P18C) and added the following remarks:

E Saya masih belum berpuashati dengan prestasi kerja beliau sebelum ini. Beliau perlu berusaha meningkatkan prestasi kerja beliau pada masa hadapan.

[20] Upon that non-recommendation, the plaintiff was given the second F extension of her probation period from 3 December 2010 to 2 December 2011. Here again, on 26 September 2011, her Head of Department gave the same non-recommendation report against the plaintiff as before (P18D) and added the following remarks:

Berdasarkan kepada pengamatan dan pengawasan saya, pegawai ini masih G tidak menunjukkan perubahan sikap dan peningkatan prestasi kerja. Oleh itu saya tidak dapat mempertimbangkan beliau untuk disahkan dalam jawatan.

[21] Once again, upon the non-recommendation by her Head of Department, the plaintiff was given the third extension of her probation H period from 3 December 2011 to 2 June 2012. Her Head of Department on 20 June 2012 gave the same non-recommendation report against the plaintiff as before with the following added remarks:

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> Sepanjang tempoh 6 bulan pelanjutan tempoh percubaan pegawai ini, hasil pengamatan dan pengawasan, saya telah mendapat pegawai masih tidak menunjukkan perubahan sikap dan mutu kerja yang positif. Pegawai masih gagal meningkatkan prestasi kerja secara berpasukan dalam organisasi. Terdapat beberapa aduan oleh pegawai-pegawai lain berkenaan pegawai ini dan siasatan dalaman mendapati aduan-aduan yang diterima adalah berasas. Sehubungan itu, saya masih tidak dapat mempertimbangkan pegawai ini untuk disahkan ke dalam jawatan.

[22] Based on the above facts alluded to, the plaintiff had failed to obtain her Head of Department's recommendation that she be confirmed in her post and by that means she had failed to fulfil condition 4(b) of the letter of offer and her service was terminated with one month's salary *in lieu* of notice. That should have been the end of the matter. But the learned JC found that since KEDA had failed to inform the plaintiff the reasons the recommendation was not forthcoming from the Head of Department, that failure amounted to a failure of "procedural fairness" as laid down in *Hong Leong Equipment (supra)* and that the termination of the plaintiff's service was had in law.

[23] It was submitted by KEDA that *Hong Leong Equipment* was not relevant to this case as it concerns termination of employment of a person whose service had already been confirmed by his employer, whereas in our case the plaintiff was still on probation. Reference was made to this court's decision in *Abd Rauf Alip v. Suruhanjaya Pasukan Polis & Anor* [2003] 1 CLJ 1 where, Gopal Sri Ram (JCA) (as he then was) in delivering the judgment of the court, at p. 4, held:

> In our view the present appeal is already covered by high authority which is binding upon us. It is the decision of the Privy Council in *Government of Malaysia v. Lionel* [1974] 1 MLJ 3 (PC). That was a case involving a temporary officer who was on contract to serve the second respondent in that appeal. He had been served with a letter to show cause, not dissimilar from that issued to the appellant in the present instance. Lionel argued that he had been wrongfully dismissed contrary to art. 135(2) of the Federal Constitution which requires a reasonable opportunity to be given to a civil servant before his dismissal. At first instance Syed Othman J, a judge for whose decisions this court has much respect, held that Lionel was not dismissed at all and that this was a case of termination *simpliciter* in accordance with the terms and conditions of his contract of service. Lionel then appealed to the Federal Court which held that there had been a breach of art. 135(2) and that the provisions of the Constitution could not be contracted out of – see [1971] 2 MLJ 172 at p 173. Accordingly the Federal Court reversed Syed Othman J. The Government of Malaysia then appealed to the Privy Council which reversed the Federal Court judgment and restored the judgment at first instance.

A The advice of the Board on that occasion was delivered by Viscount Dilhorne who said at p. 5:

> Under English law a servant may be summarily dismissed for disobedience to orders or misconduct or may have his employment terminated by notice or the payment of wages *in lieu* of notice. *Under the laws of Malaysia a similar distinction between dismissal and termination of services appears to exist* and in their Lordships' opinion *there is nothing in the Constitution which affects the right of the Government to terminate temporary employment in accordance with the terms of the engagement.* Their Lordships do not agree with Ong CJ that Regulation 36 is to be regarded as invalid as inconsistent with the Constitution. (emphasis added.)

We are bound by this statement of principle. It applies squarely to the facts of the present appeal. If Lionel could not succeed, we can hardly see how the present appellant can.

We could only make this further observation. *This is a case of a probationer. And the law has always recognised a distinction between a probationer and a permanent employee, be it in the public or private sector.* (emphasis added)

[24] For her part, the plaintiff submitted that since she had successfully complied with the terms and conditions of appointment to the post of Grade W41 Auditor, when she completed three years of probation period during which she had successfully completed the Induction Course, passed the Public Service Examination and attended the Biro Tatanegara Course, in addition to undergoing a further two-year probation period, she was entitled to her claim. That given a proper interpretation of conditions 4(a), (b) and (e) of the letter of offer, it was incumbent on the Head of Department/SD2 to confirm the plaintiff's service upon compliance of condition 4(a) by the plaintiff. Alternatively, it was argued that the failure of the Head of Department to convey to the plaintiff the reasons for not confirming her to the post, resulting in the termination of her service by KEDA, was procedurally unfair to the plaintiff and therefore the termination was of no effect based on *Hong Leong Equipment (supra).*

[25] We were of the view that a plain reading of conditions 4(a), (b) and (e) convey the meaning that the plaintiff's appointment was subject to the conditions of service as enumerated in conditions 4(a) to (l) where all the conditions are to be read conjunctively. Therefore, by virtue of condition 4(b), the plaintiff was required to obtain the recommendation of her Head of Department in order to be confirmed in her post, which she failed to obtain despite three extensions of probation period being given to her. She had, therefore, breached her condition of employment and her employment was correctly terminated by KEDA *vide* letter of termination dated 10 July 2012 (P20) with effect from 15 July 2012.

[26] With regard to the issue of KEDA not complying with the principle of "procedural fairness" *vis* the plaintiff in not informing her the reasons the recommendation was not given by the Head of Department, we agreed with the submission of KEDA that this principle in *Hong Leong Equipment (supra)* does not apply to this case seeing that the plaintiff was a probationer at all material times and she was subject to the conditions in the letter of offer. We agreed with the submission of KEDA that the case of *Abdul Rauf Alip (supra)* applied to this case.

[27] In any event, we were of the view that the learned JC had failed to fully appreciate the testimony of SD2 when he stated as follows in his witness statement:

S10. Boleh Dato jelaskan kepada Mahkamah yang mulia ini, Dato' sebagai Pengurus Besar dan juga Ketua Jabatan di Lembaga Kemajuan Wilayah Kedah (KEDA), bagaimana Dato' menegur orang bawahan termasuklah Puan Nur Dini Binti Mohd Noh sekiranya Dato' mendapati terdapatnya sikap atau tindakan para pegawai/pekerja bawahan tersebut tidak menunjukkan prestasi yang baik dalam menjalankan tugas mereka di Lembaga Kemajuan Wilayah Kedah (KEDA)?

J. Seperti amalan yang saya praktikan nasihat, teguran dan amaran kepada para pekerja/pegawai bawahan saya termasuklah Puan Nur Dini Binti Mohd Noh akan saya sampaikan ketika di dalam Perhimpunan Bulanan, Mesyuarat Pengurusan dan arahan kepada Pegawai yang menguruskan Bahagian Pentadbiran dan Sumber Manusia untuk memperbaiki sikap atau/dan tindakan mereka dalam menjalankan tugas-tugas mereka di Lembaga Kemajuan Wilayah Kedah (KEDA).

Tambahan, saya juga sentiasa menggalakkan para pegawai/pekerja bawahan termasuklah Puan Nur Dini Binti Mohd Noh untuk datang berjumpa dengan saya untuk bertanyakan apa sahaja berkaitan permasalahan mereka semasa menjalankan tugas mereka di Lembaga Wilayah Kedah (KEDA).

S11. Sepanjang Dato' menjawat jawatan sebagai Pengurus Besar dan Ketua Jabatan di Lembaga Kemajuan Wilayah Kedah (KEDA), adakah terdapat mana-mana pekerja/pegawai yang datang berjumpa Dato' secara bertentangan empat mata sebaik sahaja Dato' membuat nasihat, teguran dan amaran ke atas para pegawai/pekerja bawahan Dato' di Perhimpunan Bulanan, Mesyuarat Pengurusan dan arahan kepada Pegawai yang menguruskan Bahagian Pentadbiran untuk Sumber Manusia?

J. Ya, ada para pegawai/pekerja yang datang untuk berjumpa saya untuk bertanyakan secara lebih lanjut berkaitan nasihat, teguran dan amaran yang telah dibuat oleh saya di dalam Perhimpunan Bulanan, Mesyuarat Pengurusan dan arahan kepada Pegawai yang menguruskan Bahagian Pentadbiran dan Sumber Manusia.

S12. Merujuk kepada Puan Nur Dini Binti Mohd. Noh, adakah beliau ada datang sendiri untuk berjumpa Dato' berkaitan apa-apa nasihat, teguran dan amaran yang telah Dato' berikan sepanjang Perhimpunan Bulanan, Mesyuarat Pengurusan dan arahan kepada Pegawai yang menguruskan Bahagian Pentadbiran dan Sumber Manusia yang telah diadakan tersbut?

J. Tidak pernah.

…

S14. Adakah Puan Nur Dini Binti Mohd Noh ada datang berjumpa dengan Dato sebagai Ketua Jabatannya bertanyakan sebab-sebab beliau tidak mendapat sokongan dari Dato' sebagai Ketua Jabatannya dalam pengesahan jawatannya sebagai Juruaudit Gred W41 di Lembaga Kemajuan Wilayah Kedah (KEDA)?

J. Tiada samada secara lisan atau bertulis.

[28] Based on his testimony, we were of the view that the plaintiff's Head of Department/SD2 did give her advice, comments and warnings on her work performance, *albeit* not directly. If the plaintiff had been really concerned about not being able to obtain the Head of Department's recommendation throughout her probation and extended probation periods, we would have expected her to be more proactive in inquiring about it from the Head of Department herself. After all, other employees had seen it fit to approach the Head of Department to ask for clarification in respect of any advice, comments and warnings made by him during monthly assembly, meetings and directives issued, and yet the plaintiff chose to remain silent and unconcerned until she chose to raise this complaint (of not being told the reasons why the recommendation was not given by the Head of Department) when she filed this suit, blaming KEDA for something that she herself had failed to do.

[29] Instead, the learned JC made the following findings:

[45] Plaintif juga mengakui bahawa beliau tidak pernah dipanggil oleh majikannya untuk diberi teguran atau tunjuk ajar. Mahkamah yakin bahawa sekiranya Defendan (SD1 dan SD2) memaklumkan teguran yang tercatat di Ekshibit P18A, P18B, P18C dan P18D, Plaintif akan memperbaiki kelemahan dirinya untuk mendapatkan pengesahan daripada Ketua Jabatannya. Mahkamah mendapati dalam keadaan kes Plaintif yang melibatkan pelanjutan tempoh percubaan, tindakan Defendan membuat teguran semasa perhimpunan secara umum adalah tidak

> mencukupi dan tidak wajar dan tidak adil kerana tidak menurut peruntukan undang-undang yang diperuntukkan dan tindakan itu bertentangan dengan hak Plaintif yang dilindung di bawa Perkara 5 Perlembagaan Persekutuan.
>
> [46] Maka adalah menjadi tugas Defendan dapat memaklumkan Plaintif akan ulasan dan teguran itu supaya Plaintif dapat menambahbaik prestasi kerjaya sebagaimana yang ditegur oleh Ketua Jabatannya. Plaintif hanya mengetahui alasan kenapa beliau tidak disahkan dalam jawatannya setelah kes ini dibawa ke Mahkamah.

We were of the view that had the learned JC directed her mind properly to the evidence adduced, she would not have seriously misdirected herself into finding that KEDA was to be solely held liable for not informing the plaintiff the reasons for her not being recommended to be confirmed. The learned JC did not state how she was certain ("yakin") that had SD1 and SD2 informed the plaintiff of the remarks by SD2 in P18A, P18B, P18C and P18D, the plaintiff would have improved her work performance. It would appear to us it was mere conjecture on the learned JC's part when she made this "finding" seeing that there was hardly any explanation given by the plaintiff on how, after five years of being on probation, her performance had not improved and her reception of the SD2's advice, comments and warnings on the occasions as stated before this. We were further of the view that the application of art. 5 of the Constitution in this context was misconceived as the termination of the plaintiff's service was purely on the basis of breach of contractual terms by the plaintiff and did not involve the deprivation of her life nor personal liberty within the meaning of art. 5 of the Constitution.

[30] Further, it was submitted by KEDA that the plaintiff's employment could be terminated by KEDA at any time by one month's notice or a month's salary *in lieu* of the said notice without the need to give any reasons, as provided under condition 4(f) of the letter of offer. *Vide* letter dated 10 July 2012 (P20) KEDA had terminated the plaintiff's employment with effect from 15 July 2012 with one month's salary *in lieu* of one month's notice. Therefore it was contended that the termination of the plaintiff's probationary employment with KEDA was valid. Based on *Abdul Rauf Alip*'s case *(supra)*, which had referred to the Privy Council decision on *Government of Malaysia v. Lionel* [1973] 1 LNS 37; [1974] 1 MLJ 3, we were in agreement with KEDA that by virtue of condition 4(f) of the letter of offer, KEDA had every right to terminate the plaintiff's contract of employment as a probationer without assigning any reason for the termination (but in this case KEDA did give reason for the termination) by paying one month's salary *in lieu* of notice.

A

Conclusion

[31] In view of the above, we unanimously allowed this appeal with costs of RM20,000 to KEDA for here and below. We set aside the order of the High Court dated 14 February 2013. Deposit was refunded. We found the termination of the plaintiff's employment was consistent with the terms of the letter of offer. In view of our finding, it was unnecessary for us to deliberate on the issue of confirmation of the plaintiff in her post retrospectively and the granting of general and exemplary damages raised by KEDA.

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